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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

GLORIA DENISE GITTENS,

Defendant and Appellant.

F076936

(Super. Ct. No. F07907272)

OPINION

THE COURT*

APPEAL from an order of the Superior Court of Fresno County. Jonathan B. Conklin, Judge.

Sylvia W. Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Poochigian, J. and DeSantos, J.

Appellant Gloria Denise Gittens appeals from the trial court's denial of her petition for resentencing (Pen. Code, § 1170.18)¹ with respect to some of her convictions for second degree burglary (§ 459/460, subd. (b)).² Following independent review of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Gittens regularly stole from other people by using her victim's information, checks, and credit cards to purchase goods at various stores and obtain money from ATM machines.

In July 2008, in exchange for a 36-year lid, Gittens pled guilty to 99 counts, including charges for, among others, second degree burglary (§§ 459, 460, subd. (b)), identity theft, (§ 530.5, subd. (a)), petty theft with prior (§ 666) and receiving stolen

¹ All further statutory references are to the Penal Code, unless otherwise indicated.

² “In November 2014, California voters enacted Proposition 47, which ‘created a new resentencing provision: section 1170.18. Under section 1170.18, a person “currently serving” a felony sentence for an offence that is now a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47. [Citation.] A person who satisfies the criteria in section 1170.18 shall have his or her sentence recalled and be “resentenced to a misdemeanor ... unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.” ’ ” (*People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 448 (*Rivas-Colon*).)

“Proposition 47 added section 459.5, which classifies shoplifting as a misdemeanor ‘where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars (\$950).’ (§ 459.5, subd. (a).) ‘[T]o qualify for resentencing under the new shoplifting statute, the trial court must determine whether defendant entered “a commercial establishment with intent to commit larceny while that establishment [was] open during regular business hours,” and whether “the value of the property that [was] taken or intended to be taken” exceeded \$950. (§ 459.5.)’ ” (*Rivas-Colon, supra*, 241 Cal.App.4th at p. 448.)

The trial court is charged with determining whether a petitioner is eligible for resentencing. (§ 1170.18, subd. (b).) However, a petitioner has the initial burden of introducing facts sufficient to demonstrate eligibility. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879-880.)

property (§ 496, subd. (a)). Gittens also admitted several enhancements and two strike convictions (§ 667, subds. (b)-(i)). Additionally, the court indicated that it would strike her two strike convictions and the People later dismissed six counts. Gittens was subsequently sentenced to an aggregate sentence of 36 years.

Following enactment of Proposition 47, the trial court granted, in part, Gittens's petition to have her convictions reduced to misdemeanors and reduced 30 convictions, all of which were petty theft or receiving stolen property charges for which she had received concurrent terms that resulted in no reduction to Gittens's aggregate sentence. The remaining charges were found to be ineligible for various reasons. As to the second degree burglary convictions, the trial court denied resentencing, holding that entering a store with the intent to commit identity theft or theft by false pretenses did not qualify as shoplifting under Proposition 47 and that Gittens had the burden of proof on eligibility.

Following a timely appeal, we affirmed the judgment without prejudice to Gittens filing a second petition because Gittens's initial petition failed to support her claims and the failure could have resulted from her petition having been filed before the courts provided substantial guidance on her burden to demonstrate a trespassory taking, as we had determined was required by the shoplifting statute.

Gittens sought review in the Supreme Court which ultimately ordered this court "to vacate its decision and to reconsider the cause in light of the decision in *People v. Gonzales* (2017) 2 Cal.5th 858[] (*Gonzales*)," which held that the definition of shoplifting pursuant to Proposition 47 encompasses non-larcenous thefts. (*Gonzales, supra*, 2 Cal.5th at p. 862.) Following transfer to this court, we agreed with the People's concession that, pursuant to *Gonzales*, Gittens's second degree burglary convictions could be eligible for resentencing. We also remanded the matter for the trial court to consider, in the first instance, the value of the goods at issue and any other related statutory issues, including whether Gittens should be resentenced under relevant statutory

provisions with respect to her 27 second degree burglary convictions—counts 2 through 4, 24 through 33, 35, 38, 49, 51 through 54, 57, and 61 through 66.

At a hearing on January 8, 2018, defense counsel advised the court that although the police reports in his file were incomplete, Gittens had copies of many of them. Defense counsel also asked for and received a continuance so he could make copies of the reports for the prosecutor.

On January 22, 2018, based on the documentary information provided by defense counsel, the prosecutor and defense counsel both agreed that Gittens had shown she was eligible for reduction of the second degree burglaries she was convicted of in counts 2, 25 through 33, 35, 38, and 52. The court then reduced those counts to misdemeanors. Further, since Gittens received a consecutive eight-month term on each of the counts that was reduced, her aggregate sentence was reduced to 27 years four months.

On January 23, 2018, Gittens filed a timely appeal.

Gittens's appellate counsel has filed a brief that summarizes the facts, with citations to the record, raises no issues, and asks this court to independently review the record. (*People v. Wende, supra*, 25 Cal.3d 436.) However, in letter filed on August 13, 2018, Gittens states that she believes her identity theft convictions can be reduced pursuant to Proposition 47. We decline to address this issue because it was not included within the scope of our previous remand that resulted in the order from which the instant appeal was taken. However, we do so without prejudice to Gittens filing a second petition raising this issue because of the lack of case law addressing the scope of Proposition 47's reclassification provisions when Gittens filed her original petition.

Following an independent review of the record, we find that no reasonably arguable factual or legal issues exist.

DISPOSITION

The order appealed from is affirmed.³

³ Gittens “Motion for Judicial Notice” of the record of her prior appeal, filed on July 3, 2018, is denied.